

MAY 26 1987

JOSEPH E. SPANIOLO, JR.
CLERK

No. 87-1706

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

WALTER J. KELLY, Superintendent, Attica Correctional
Facility, and STATE OF NEW YORK,

Petitioners,

—against—

GREGORY JOHNSTONE,

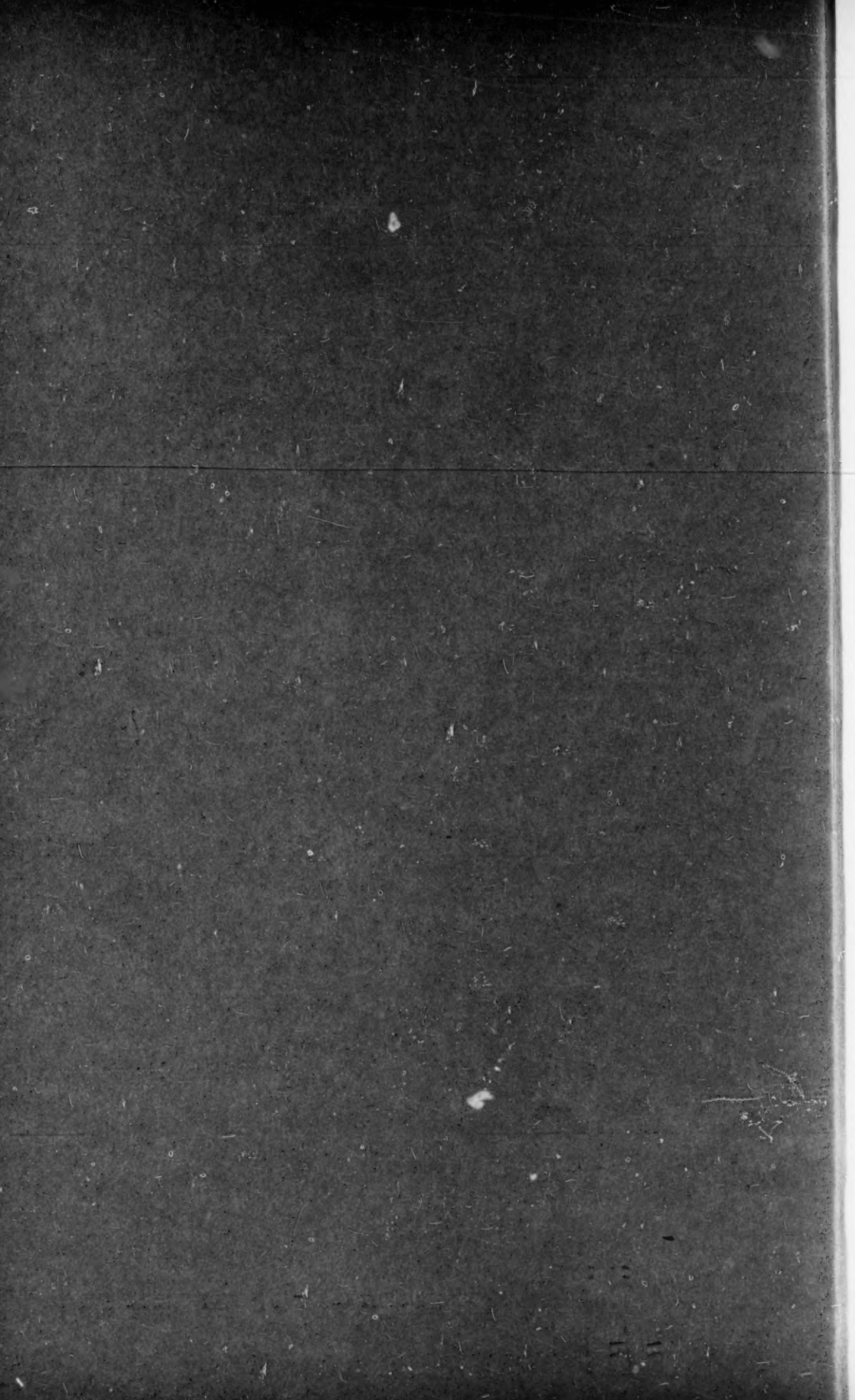
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

APPENDIX IN OPPOSITION

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[Transcript ("Tr.") 32]
 SUPREME COURT OF THE
 STATE OF NEW YORK
 COUNTY OF NEW YORK
 PART: 57

-----X	
THE PEOPLE OF THE	: <u>Indictment No.</u>
STATE OF NEW YORK	: 110/81
	:
- against -	: <u>Charge:</u> Arson
	: First Degree
GREGORY JOHNSTONE,	:
	:
Defendant	: Trial
-----X	

111 Centre Street
 New York, New York
 January 6, 1982

B E F O R E:

THE HONORABLE ARNOLD FRAIMAN,
 Justice and a Jury

A P P E A R A N C E S:

(SAME AS PREVIOUSLY NOTED)

COURT CLERK: Case on trial,
 the People of the State of New York
 against Gregory Johnstone, Indictment
 Number 110 of 1981.

THE COURT: Please bring the Jury in.

MR. VAN LEER: Before the Jury comes in, the Defendant wants to make a statement.

[Tr. 33] THE COURT: Yes, Mr. Johnstone?

THE DEFENDANT: I want to do some speaking myself.

THE COURT: What do you mean by that?

THE DEFENDANT: Talking to the witnesses.

THE COURT: You want to cross-examine the witnesses?

THE DEFENDANT: Yes.

THE COURT: Well, I would prefer that you did it through you [sic] lawyer, Mr. Johnstone. It is not the usual practice to have a Defendant himself examine witnesses.

What I suggest you do is have a pad and a pencil and write out the questions that you think should be put to the witness. You can hand them to your lawyer. Before he finishes questioning each witness, I will ask him to consult with you to find out what additional questions you think he should ask the witness.

That seems to be a better way to proceed because he can phrase the question properly so it will be admissible and will not be an objectionable question. It will give you a chance to say however you think the question should be put to the witness.

[Tr. 34] Let's try it that way, and see how it works out.

MR. VAN LEER: He wants to open.

THE COURT: No, you will make

the opening statement.

MR. VAN LEER: He says he wants to open.

THE COURT: I just said you will make the opening statement, Mr. Van Leer.

Bring the Jury in.

(Whereupon, the Jury enters the courtroom.)

THE COURT: Good morning, ladies and gentlemen. The Record should reflect it is now twenty minutes after 10:00. Juror Number Five has not appeared. I will ask the first alternate Juror to take the place of Juror Number Five. And, madame, would you move up to the alternate seat. Please have that Juror report to me at the end of the session today.

COURT CLERK: Yes, your Honor.

THE COURT: Ladies and gentle-

men, we are about to begin the trial of the case about which you heard a few details during the process of Jury selection.

Before the trial itself begins, there are a [end of transcript page]

[Tr. 414]
 SUPREME COURT OF THE
 STATE OF NEW YORK
 COUNTY OF NEW YORK
 PART: 57

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THE PEOPLE OF THE	: <u>Indictment No.</u>
STATE OF NEW YORK	: 110/81
	:
- against -	: <u>Charge:</u> Arson
	: First Degree
GREGORY JOHNSTONE,	:
	:
Defendant	: Trial
-----X	

111 Centre Street
 New York, New York
 January 8, 1982

B E F O R E:

THE HONORABLE ARNOLD FRAIMAN,
 Justice and a Jury

A P P E A R A N C E S:

(SAME AS PREVIOUSLY NOTED)

[Tr. 508] THE COURT: All right, tell Mr. Smith he can go home.

THE DEFENDANT: I am saying, the witnesses that testified were not not [sic] witnesses.

THE COURT: What witnesses?

THE DEFENDANT: Miss Larry and Miss Mills.

THE COURT: They weren't your witnesses? I don't know whose witnesses they were. They were called by your lawyer. I gather he consulted with you before he called them.

MR. VAN LEER: He want [sic] to sum up himself, he does not want me to do it.

THE DEFENDANT: I want to call Miss Xavier to come to Court to testify, I was going to school and working to bring insurance policies, and Mr. David Satterfield.

THE COURT: If you can get them here by Monday, I will permit it.

THE DEFENDANT: I want Mr. Tally.

THE COURT: You can have whoever you want but you will have to get them here by Monday. I am not going to put the case over beyond Monday.

Anything else this afternoon?

MR. VAN LEER: Mrs. Pearce is outside.

[Tr. 512] summations on Monday.

I am sorry you had to stay and be sent home without any further testimony, but I didn't know that we were not going to have additional testimony this afternoon.

So, enjoy your weekend and we will all see you on Monday morning at 10:00. The Jury is now excused.

(Whereupon, the Jury was excused.)

THE COURT: Mr. Johnstone, with respect to your request to sum up yourself, let me say at the outset, if that is definitely what you want to do after discussing it with your attorney, and after you hear what I have to say, I will permit you to sum up by yourself.

I think it would be a terrible mistake on your part -- Just listen to me. I am going to let you do it if you

want to do it. But I think it would be a terrible mistake on your part, your attorney has presented the case in your behalf. He has cross-examined the witnesses who have been called by the District Attorney, diligently. He has a certain number of points, I am sure, that he has in mind to argue to this Jury.

[Tr. 513] I am not prepared to suggest that the Jury is going to find in your favor because I don't know how this Jury is going to find.

But it seems to me, in the basis, as the case has been presented, there certainly is a possibility that the Jury is going to find in your favor. Whether it will or not, I don't know. I never have been able to predict how cases will come out with any accuracy. But I think that the chances of

the Jury finding in your favor will be severely diminished if you sum up yourself.

You have neither the experience nor the speaking ability, nor the legal training to be able to present your arguments in the best possible light.

I say, I think you would be making a grave mistake if you choose to do this. But, if you want to sum up yourself, I am prepared to permit you to do so, if that is what you want to do.

THE DEFENDANT: Yes, I want to.

THE COURT: You can think about it over this weekend.

THE DEFENDANT: I made my mind up.

THE COURT: I suggest you think it over because you have a great deal at stake here. As [Tr. 514] I told

you at the outset of this case, your whole future is at stake or a substantial part of it, depending upon how this case comes out.

You are a young man and it seems to me that you ought to give various heed to what advise [sic] your attorney gives you and what I have had to say, but you don't have to. I want to stress that to you. You can make up your own mind.

THE DEFENDANT: Thank you.

THE COURT: The only thing I want to tell you, if you do sum up yourself, you must limit yourself to what the evidence has been in this case.

You cannot say anything in your summations about anything that is not in the Record in this case. In other words, you cannot talk about any of these papers that I have not allowed

to go into evidence. You cannot give your version of what happened. You cannot tell the Jury where you were or what you were doing.

THE DEFENDANT: I have to.

THE COURT: Do you understand that?

THE DEFENDANT: When I give my summation, I am going to tell them how, when I came on the block, and the police came to me, and all of that, [Tr. 515] I am going to tell them that I did not run from the police. I gave them my mother's address. I will let them know I was at Veritas and they came a couple of times and arrested me. I am going to let them know all of this here.

THE COURT: You cannot do that.

THE DEFENDANT: If he was speaking, he would say it, right? He said it at the last trial.

THE COURT: He can only say what is in the Record in this case.

THE DEFENDANT: This is in the Record.

THE COURT: I don't know anything in the Record about your being at Veritas.

THE DEFENDANT: You don't even know my case.

THE COURT: All I know is what I heard from the witnesses, Mr. Johnstone. All I know is what I heard from the witnesses and that is all.

THE DEFENDANT: I am telling you I was in Veritas, I was in Veritas.

THE COURT: Mr. Johnstone, you may have very well been in Veritas, but since you have not testified yourself, that is not before the Jury that you were in Veritas.

THE DEFENDANT: They will

know. Are you [Tr. 516] going to tell me to stop talking?

THE COURT: Yes.

If you tell me you are going to say things like that, you are not going to sum up, it is as simple as that.

THE DEFENDANT: Okay, thank you.

THE COURT: Don't try to play fast and loose with me and try to use your summation to say things that are not in evidence.

You are getting very close to throwing to the wind all the good that Mr. Van Leer has done for you during the course of this trial. You want to throw that out the window in just a few minutes through your own summation. That is up to you.

THE DEFENDANT: I am giving my own summation.

THE COURT: That is what you are risking.

We will recess until 10:00 Monday morning now.

(Whereupon, the Court was in recess until January 11, 1982 at 10:00 A.M.)

[Tr. 517]
 SUPREME COURT OF THE
 STATE OF NEW YORK
 COUNTY OF NEW YORK
 PART: 57

-----X
 THE PEOPLE OF THE : Indictment No.
 STATE OF NEW YORK : 110/81
 :

- against - : Charge: Arson
 : First Degree
 GREGORY JOHNSTONE, :

Defendant : Trial

-----X

111 Centre Street
 New York, New York
 January 11, 1982

B E F O R E:

THE HONORABLE ARNOLD FRAIMAN,
 Justice and a Jury

A P P E A R A N C E S:

(SAME AS PREVIOUSLY NOTED)

COURT CLERK: Case on trial
 continued, the People against Gregory
 Johnstone.

The Defendant, his Counsel and

the Assistant District Attorney are present. Jurors are not present, your Honor.

MR. VAN LEER: The witness should have been here. I will go and look. He said he would be [Tr. 518] here at 9:30 or a quarter to 10:00 this morning.

THE COURT: What is he going to testify to?

MR. VAN LEER: Alfred Brooks is with the New York Property Insurance Underwriters Association, 161 Williams Street, New York. He will testify as to the coverage of fire insurance of Donald Mitchell and what he is supposed to bring forth is his application for the insurance recovery in reference to the fire and insurance company's rejection.

THE COURT: I will not take any testimony about the insurance com-

pany's rejection about the application.

Do you want to stipulate about the insurance, do you know what the insurance coverage was?

MR. MATTHEWS: I don't know.

MR. VAN LEER: He said it was \$3,000.

MR. MATTHEWS: That is what the man said.

THE COURT: Who said?

MR. MATTHEWS: Mr. Mitchell said.

THE COURT: Did they confirm it was \$3,000?

MR. VAN LEER: On the telephone, yes.

THE COURT: What is he going to add, then?

MR. VAN LEER: Other than the fact it has [Tr. 519] not been paid --

THE COURT: That I will not

allow. It is totally irrelevant. I do not see the fact that the insurance company has made an independent determination that they are not going to pay on the policy, that certainly is not admissible in this Court.

MR. VAN LEER: The Defendant has been asking for a Ms. Reid, who was a person working for Project Real, and the investigator spent the entire weekend trying to locate this Project Real. The Defendant gave an address on 149th Street and Third Avenue.

The investigator has been to 149th Street and Third Avenue and checked with the telephone company and checked with the 40th Precinct. No one can seem to locate this Project Real. So he has not located Ms. Reid.

As to James Satterfield, he has made an effort to find him. He

checked with the Welfare Department, checked with other people at 111 West 143rd Street and at 115 West 143rd Street. He could not find him either.

The Defendant says he is ready for summation. The fact we cannot get these witnesses, he is ready [Tr. 520] to sum up.

THE COURT: Do you want to go ahead without the witness?

MR. VAN LEER: That is what he says.

THE COURT: Mr. Johnstone, have you thought over what I said to you?

THE DEFENDANT: I have nothing else to say.

THE COURT: You still want to sum up yourself?

THE DEFENDANT: Yes.

THE COURT: Do you understand the risks you are taking with this?

THE DEFENDANT: Yes.

THE COURT: Giving up a very valuable right, in essence, where your lawyer has an opportunity to make all arguments that he is prepared to make in your behalf, and you are giving that up to sum up by yourself.

Do you definitely want to do that to yourself?

THE DEFENDANT: Yes.

THE COURT: Have you thought about it?

THE DEFENDANT: Yes.

THE COURT: Well, I again want to advise you. I am doing this mainly for the Record now, because I have advised you of this on Friday as well. I think [Tr. 521] this is a terrible mistake on your part. It is one of the most important phases of the trial where the case can be won or lost, generally.

And, your attorney has presented this case with certain strategy in mind. I am sure he is prepared to sum up, following through on the trial strategy that he has applied throughout the case.

You are losing the opportunity of availing yourself of his summation by insisting on summing up yourself. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: You still want to sum up yourself?

THE DEFENDANT: Yes.

THE COURT: All right, you also understand that in summing up you must limit your summation to the evidence that has been presented on this trial, and to nothing else. I am not going to permit you to discuss matters that are not part of the evidence in this case.

Do you understand that I am speaking to you, Mr. Johnstone?

THE DEFENDANT: I have nothing further to say.

THE COURT: Pardon Me [sic]?

THE DEFENDANT: I have nothing else to say [Tr. 522] to you.

THE COURT: You will answer my question because I am not going to permit you to sum up. You assure me you will limit your summation to what has been presented on this trial, what has been presented on the evidence in this case? Can I have your assurance of that?

THE DEFENDANT: (No response)

THE COURT: In that case, I will not permit you to sum up.

THE DEFENDANT: I will get up.

THE COURT: You will what?

THE DEFENDANT: I am going to get up.

THE COURT: You are not going to get up anyplace, Mr. Johnstone.

THE DEFENDANT: I have a right to give my own summation. I don't want him to give my summation. I got a lot of things that I have to do.

You were going to allow my lawyer to do what he was supposed to do, a lot of things did not work out. He can never find an investigator. I am going to sum up myself.

THE COURT: Just a minute, just a minute. [Tr. 523] I would permit you to sum up if you would give me your assurance you would limit your summation to the evidence that has been presented on this trial. Nothing else.

THE DEFENDANT: Yes.

THE COURT: Can I have your assurance of that?

THE DEFENDANT: You got it.

THE COURT: What [sic] that?

THE DEFENDANT: You got it.

THE COURT: I can't hear you?

THE DEFENDANT: I said you got it.

THE COURT: Bring the Jury in, please.

(Whereupon, the Jury enters the courtroom.)

COURT CLERK: Case on trial is continued, the People of the State of New York against Gregory Johnstone.

All parties, including the sworn Jurors and the alternates are present in the courtroom.

THE COURT: Good morning, ladies and gentlemen. I want to congratulate you, all of you, for getting in this morning. I think it is quite remarkable.

Does the Defendant have any

witnesses that he intends to call?

MR. VAN LEER: Judge, as I expressed before, [Tr. 524] the witnesses that were available have not appeared. Two have been subpoenaed, they have not appeared, and the other two I could not find. My investigator could not find.

THE COURT: I guess you have not [sic] witnesses?

MR. VAN LEER: We have no further witnesses. At this time, after consulting with the Defendant, we have one thing further that we have to discuss, your Honor.

(Whereupon, a discussion was held between Defense Counsel and Defendant.)

MR. VAN LEER: The Defendant now rests, your Honor.

THE COURT: Thank you, Mr. Van Leer.

In that case we are going to have the summations at this time, ladies and gentlemen.

Now, the Defendant has expressed a desire to sum up himself rather than through his attorney. I have given him permission to do so.

I want to advise you at this time, and remind you, what the Defendant says in his summation, like what the District Attorney says in his summation, is not evidence, and must not be considered by you as such.

